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Case No. 86-820

In The

Supreme Court of the United States

October Term, 1986

JOHN HIMMILRIGHT,

Petitioner,

-v-

CURTIS FOULKS, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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—o—

To the Chief Justice and the Associate Justices
of the
Supremen Court of the United States

STATEMENT OF THE CASE

This employment discrimination case, brought pursuant to 42 U.S.C. Section 1981, was filed by Respondent, Curtis Foulks, Jr., a black citizen, against his following former employers: the Ohio Department of Rehabilitation and Correction, the Ohio Adult Parole Authority (hereinafter,"A.P.A."), administered by said Department, and various supervisory personnel of the Department and the A.P.A., specifically, for purposes of this Brief, Morris DeForge and John R. Himmilright.

The lawsuit was brought by Mr. Foulks on February 20, 1976 to redress numerous and varied violations, by his former employers, of his constitutionally guaranteed right to be free from racial discrimination in employment. The discrimination complained of encompassed the period from February 21, 1971, when Mr. Foulks was hired by the Department, A.P.A., to September 15, 1972, when he resigned from the Department, A.P.A. The evidence at trial established that his resignation was a constructive discharge.

This case was tried to the United States District Court for the Northern District of Ohio, Western Division, and upon conclusion of a four-day trial, and the submission of an additional deposition, the District Court rendered judgment in favor of Respondent on August 12, 1980 on the issue of liability under 42 U.S.C. Section 1981. Neither DeForge nor Himmilright testified at trial.

The District Court's "tentative" finding, referred to on pages 3-4 of Petitioner's Brief, was mentioned by the Court prior to the taking of the aforementioned deposition.

Subsequent thereto, on April 27, 1981, the District Court awarded Mr. Foulks damages in the amount of $4,558.70 and attorney fees, pursuant to 42 U.S.C. Section 1988. The District Court awarded the damages and attorney fees against then-defendants, Department, A.P.A. and against the subsequently deceased Morris DeForge, individually and as Unit Supervisor, Parole Supervision Section and John R. Himmilright, individually and as Unit Supervisor, Probation Development Section. The damages and attorney fees were awarded against the three defendants, jointly and severally.

The case was appealed by said defendants to the Sixth Circuit Court of Appeals on August 4, 1983. In a split decision, the Court of Appeals held, inter alia, that the Eleventh Amendment barred recovery from the Department, A.P.A. The Court of Appeals further held that the District Court's findings of fact and conclusions of law failed to provide a sufficient basis for review of the judgment after elimination of the state defendant through sovereign immunity.

Finding that the District Court apparently did not hold DeForge and Himmilright individually responsible for *all* the disparate treatment that Mr. Foulks experienced during his employment with the Department, A.P.A., the case was remanded by the Court of Appeals for a specific finding of the basis of relief against the two remaining parties, DeForge and Himmilright, and the amount of damages, if any , suffered by reason of the acts of each. *Foulks v. Ohio Department of Rehab. & Correction*, 713 F.2d 1229 (6th Cir. 1983); cf *id.*, at 1234 (Keith, J., dissenting).

At this juncture, having reference to Judge Keith's dissenting opinion, *id.*, Respondent takes great exception to

Petitioner's present characterization of the facts as they relate to the use of racial slurs by Respondent's former employers and as they relate, chronologically and factually, to Himmilright's racially motivated interference with Respondent's attempts to secure employment with the Lucas County, Ohio Probation Department.

The evidence established at trial, reiterated by Judge Keith, was as follows:

> "Section 1981 also forbids the degradation of individuals because of their race. In addition to denying Mr. Foulks' request to attend training seminars, the defendants created an atmosphere charged with racial tension. DeForge openly discussed his lack of confidence in Mr. Foulks' work, and expressed his belief that Black people are liars and cannot be trusted. His disdain for the race further resounds in his use of the word "Nigger" and his reference to Mr. Foulks as a "Black Fox" and a "Black Gable." In the midst of this racially charged atmosphere, DeForge allegedly told Mr. Foulks, "My daughter was raped by a Black man, and I know how you feel."
>
> Moreover, Mr. Foulks' professional advancement was greatly hindered by the manifestations of the defendants' prejudice. Mr. Foulks testified that his professional activities were largely circumscribed by DeForge's efforts to minimize his contact with White counterparts. After continuously being denied promotions, Mr. Foulks sought employment elsewhere. His efforts in this regard were effectively thwarted when Mr. Himmilright responded negatively to a request for a recom-

> mendation. According to Mr. Himmilright, Mr. Foulks was antagonistic and a troublemaker who displayed a poor relationship with his fellow workers and was generally hard to get along with. As the court below correctly noted, a subsequent investigation revealed that the comments were false and racially motivated. In fact, Mr. Foulks had received several outstanding recommendations including one from his regional supervisor in the state office." *Foulks v. Ohio Dept. of Rehab. & Correction*, 713 F.3d 1229, 1235-1236 (6th Cir. 1983) (Keith, J. dissenting).

Pursuant to the Sixth Circuit Court of Appeals' instructions on remand, the District Court, in conjunction with its Opinion of August 12, 1980, set forth findings of fact and conclusions of law as pertained solely to DeForge and Himmilright.

Upon remand, the District Court, having had the benefit of hearing all of the testimony, considering the credibility of the witnesses and considering the exhibits presented during a four-day trial and, the District Court, having considered the issues on remand presented in the form of briefs arguing summary judgment, again rendered judgment in favor of Respondent on August 8, 1985.

Based solely on the District Court's finding of DeForge and Himmilright's racial discrimination toward Mr. Foulks, the District Court awarded damages against DeForge and Himmilright and attorney fees, ordered to be paid by the A.P.A.

In a unanimous decision, filed on August 11, 1986, the Sixth Circuit Court of Appeals affirmed the judgment

against both individual defendants, DeForge and Himmilright, and reversed the judgment for attorney fees against the A.P.A.

REASONS FOR DENYING THE WRIT

I. THE CREDIBILITY OF WITNESSES, WEIGHT AND SUFFICIENCY OF EVIDENCE, ARE INSUFFICIENT QUESTIONS TO WARRANT THE GRANTING OF CERTIORARI.

The Petitioner does not seriously contend that this case involves any important question in construction of a federal statute nor, for that matter, that this case involves a failure by the Sixth Circuit Court of Appeals to follow the correct standards for appellate review.

Unquestionably, the Court of Appeals rendered its decision on the basis of the "clearly erroneous" standard set forth by this Court in the case of *United States v. United States Gypsum Co.*, 333 U.S. 364, 92 L.Ed. 746, 68 S.Ct. 525 (1948).

The Court of Appeals, in its decision of August 11, 1986, specifically found that as to the issues of liability and damages, the trial court's findings of fact were, "not clearly erroneous".

The Sixth Circuit has consistently adhered to the "clearly erroneous" standard. See, e.g., *Hayes v. Memphis Police Dept.*, 634 F.2d 350 (6th Cir. 1980).

In the *Hayes* case, the Sixth Circuit Court of Appeals adhered strictly to the "clearly erroneous" standard. This

application of the standard is supported by the case of *Stanley v. Henderson,* 597 F.2d 651 (8th Cir. 1979). In the *Stanley* case, the Eighth Circuit Court of Appeals set forth the basis for strict application of the "clearly erroneous" standard:

> "This case was based almost entirely upon sharply conflicting oral testimony. As such, the issue was primarily one of the credibility of witnesses. As we recently reiterated in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Goldman,* 593 F.2d 129 at 131-132 (8th Cir. 1979):
>
> 'It is not the function of an appellate court to try the case *de novo,* or to pass upon the credibility of witnesses or the weight to be given their testimony...' *Shull v. Dain, Kalman & Quail, Inc.,* 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1281, 55 L.Ed. 2d 792 (1978). This is especially true where the case is primarily based upon oral testimony and where the trial judge has had an opportunity to view the demeanor and credibility of the witnesses. *E.g., Snodgrass v. Nelson,* 503 F.2d 94, 96 (8th Cir. 1974).' *Stanley v. Henderson,* 597 F.2d 651, 653 (8th Cir. 1979)."

Moreover, Petitioner's reliance on Rule 52(a) of the Federal Rules of Civil Procedure is misguided. Rule 52(a), in pertinent part, states as follows:

> "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The petition for a Writ of Certiorari states that the petitioner is John Himmilright, a former probation officer employed by the Ohio Adult Parole Authority.

Himmilright did not testify at trial regarding his role in this matter. Others did. Even Petitioner, at page 9 of the Petition, lamely concedes that Respondent showed that Himmilright made negative comments to the Lucas County Probation Department. Petitioner is absolutely incorrect, however, in his assertion that Respondent was hired "within days" of such comments.

The evidence against Himmilright at trial, both oral and documentary, far exceeded Himmilright's present concession of course and the trial court took the opportunity to judge the credibility of the witnesses and the documentary evidence.

The parties to this proceeding having been identified, it is only the evidence regarding Petitioner Himmilright that may properly be sought to be put before this Court by him. He has no standing to do otherwise. As to granting his request for certiorari, this Court has addressed Himmilright's situation:

> "...It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.* 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S. Ct. 422 (1923), cited in *Rice*

v. *Sioux City Cemetary;* 349 U.S. 70, 79, 99 L.Ed. 897, 904, 75 S. Ct. 614 (1954).

This case is not the sort of case described above. Nor, as Petitioner suggests, is the Sixth Circuit Court of Appeals' decision of August 11, 1986 in conflict with the decisions of this Court cited in the Petition, as to the law. Petitioner has merely substituted factual arguments for legal agruments.

II. QUESTIONS OF PRECLUSION AND THE EXISTENCE OF A CASE OR CONTROVERSY WERE NOT RAISED BELOW.

Petitioner has asked this Court to issue a writ of certiorari to review the Sixth Circuit Court of Appeals' decision of August 11, 1986.

No issues of preclusion or the existence of a case or controversy were raised by Petitioner in the Court of Appeals and consequently, that Court did not address such issues in its decision of August 11, 1986.

Moreover, as previously stated, Himmilright has no standing to argue case or controversy as set forth in the Petition. Accordingly, questions of preclusion and case or controversy are not open in this proceeding. *Ellis* v. *Dixon*, 349 U.S. 458, 99 L.Ed. 1231, 75 S. Ct. 850 (1955), rehearing den., 350 U.S. 855, 100 L.Ed. 759, 76 S. Ct. 37 (1955).

CONCLUSION

For the reasons set forth above, this Court should not grant certiorari.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT.

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief in Opposition have been served upon Petitioner, John Himmilright by forwarding such copies to his counsel, Allen P. Adler, State Office Tower, 30 E. Broad Street, 26th Floor, Columbus, Ohio 43266-0410, by United States Mail, postpaid this _____ day of December, 1986. I further certify that all parties required to be served have been served.

GEOFFREY H. DAVIS
Attorney for Respondent